Supreme Court, U. S.
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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1975

No. 75-262

HENRY DODGE, ZOLTON FERENCY, BARBARA HALPERT and DWIGHT W. JOHNSON,

Plaintiffs-Appellants,

vs.

RICHARD H. AUSTIN, Secretary of State, State of Michigan,

Defendant-Appellee,

and

LILLIAN HATCHER, EDWIN P. HUGHES, A. ROBERT KLEINER and VIRGINIA SELIN,

Intervening Defendants-Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION TO DISMISS OR AFFIRM

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The Appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the United States District Court for the Eastern District of Michigan, Southern Division, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED AND THE NATURE OF THE CASE

A. The State Constitutional and Statutory Provisions.

This appeal raises the question of the validity of Article IV, Sec. 6 of the Michigan Constitution of 1963, and its statutory counterpart, the latter being §1 of Act 46 of 1963 (2nd Ex Sess), (MCLA §4.11; MSA §2.28(1)).

This state constitutional provision and statute provide for an apportionment commission to apportion and district the Michigan legislature. The commission is composed of eight electors, four of whom are selected by each of the two political parties whose candidates for governor received the highest vote at the last election preceding each decennial apportionment. If the gubernatorial candidate of a third party has received more than 25% of the vote at the aforesaid election, then the apportionment commission consists of 12 members, four of whom are selected by the third political party. The constitutional provision and statute further provide that in selecting their members of the apportionment commission each political party shall select one member from each of four regions comprising the State of Michigan, viz., the upper peninsula, the northern part of the lower peninsula, the southwestern part of the lower peninsula and the southeastern part of the lower peninsula.

B. The Proceedings Below

Appellants are an independent voter, two officials of the Human Rights Party of Michigan, and an official of the American-Independent Party.

Appellants challenged Article IV, Sec. 6 of the Michigan Constitution of 1963, and its statutory counterpart, before a three-judge District Court convened pursuant to 28 USC 2281. Appellants contend that the manner in which the apportionment commission is selected denies them the effective right to associate, the right to vote and the right to equal protection of the laws in violation of the First and Fourteenth Amendments. Appellants further contend that Michigan's method of selecting its apportionment commission is an unconstitutional delegation of legislative powers, that members of the apportionment commission are selected from malapportioned districts, and that by reason of this Court having set aside Michigan's method of drawing *legislative* districts (*Marshall* v *Hare*, 378 US 561 (1964), Michigan's method of selecting an apportionment commission is likewise tainted.

A majority of the three-judge District Court held that ". . . the Michigan Apportionment Commission scheme provided in Article IV, Section 6 of the 1963 Constitution is not infirm under the First or Fourteenth Amendments of the United States Constitution." and granted appellees' motions for summary judgment.

II.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION

Appellants make no contention that the present legislative districts in Michigan do not comport with the requirements of *Reynolds* v *Sims*, 377 US 533, 12 L ed 506, 84 S Ct 1362. To the contrary, Michigan's districts, drawn by the apportionment commission sought to be outlawed by appellants, are nationally outstanding meeting the requirements of *Reynolds*. See

page 34 of the Appendix of Appellant's Jurisdictional Statement. In view of this fact, appellants' claim that they are being denied "the effective right to vote" (p. 4 Juris St), may only be construed as claiming that they, and presumably every other identifiable political group in the State of Michigan, have a constitutional right to participate in the decisional process which results in a plan of legislative apportionment. Merely to state the proposition demonstrates its lack of viability, and no case law exists in support thereof. As the Court stated in *Pirincin* v *Board of Elections of Cuyahoga County,* 368 F Supp 64, aff'd 414 US 900:

> "The reasonableness of the methods of selection of boards of elections may be tested by considering alternative methods. Were each county board enlarged to include representatives of all minority parties as well as independent voters, it is likely that the boards would be unwieldy. They would be too large to function as election machinery managers. Moreover, it is apparent that one or two independent voters who might be appointed could not truly serve as adequate representatives of all independent voters. Each independent voter can really only represent himself."

Since *Gaffney* v *Cummings,* 412 US 735, 37 L Ed 2d 298, 93 S Ct 2321, wherein a bi-partisan appointed commission performed Connecticut's legislative apportionment, and claimed constitutional violations resulting from political bias were raised before this Court and rejected, contentions such as those made by appellants have been without basis in law. To the same effect, *Grivetti* v *Illinois State Electoral Board,* 335 F Supp 778, affirmed 406 US 913. In *Gaffney,* this Court acknowledged that "Politics and political considerations are inseparable from districting and apportionment . . . The reality is that districting inevitably has and is intended to have substantial political consequences." Thus, ". . . we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign states." *Gaffney* at 298, 310.

Legislative reapportionment has always been, historically and in the first instance, a legislative function. It is only because some legislatures failed to properly perform this function that *Baker* v *Carr,* 369 US 186, *Reynolds* v *Sims, supra,* and their progeny, came into being. Assume, arguendo, that Michigan's present heavily Democratic legislature performed the reapportionment function in accord with the rule of *Reynolds.* And assume further, that the legislative districts thus drawn resulted in an equally heavy Democratic legislature, with no "Independent", "Human Rights Party", or "American Independent Party" members. Could appellants validly claim their "effective right to vote", " to associate", and to equal protection of the law had been violated? Obviously, the answer is "no". To say otherwise would give appellants the constitutional right to have their parties represented in the legislature, regardless of election results. How then can these same claims be validly made concerning the apportionment commission, which is a non-legislative body whose only function is to draw district lines? While the apportionment commissioners may be appointed from areas of the state which are not equal in population, the principles of *Reynolds, supra,* do not apply to the selection of appointive or non-legislative officials. *Sailors* v *Board of Education of the County of Kent,* 387 US 105, and *Gaffney* and *Grivetti, supra.*

Appellants have shown no substantial burden on their 'right to vote or associate', but in the last analysis their complaint appears to be addressed to the fact that neither candidates of their parties nor 'independent' candidates have been elected to the Michigan legislature. This fact has not denied them constitutional representation in the legislature or the right to vote or associate, and appellants make no claim that Michigan's legis-

lative districts invidiously discriminate against any racial, religious or political group. With regard to the latter, Art IV, sec 6 of the Michigan Constitution of 1963, gives any elector the right to appeal any apportionment plan to the Michigan Supreme Court. Despite appellants' cynicism concerning the non-partisanship of the Michigan Court (Juris. St. 22, 23), it must be presumed that all constitutional claims by electors will be carefully examined by the Court.

Finally, appellants claim that by virtue of this Court's action in *Marshall* v *Hare,* 227 F Supp 989, rev'd, 378 US 561 (1964), wherein this Court struck down Michigan's legislative apportionment for failure to comply with *Reynolds* v *Sims, supra,* the apportionment commission also succumbed by virtue of non-severability from the stricken portions of the scheme. Appellants correctly state that the question of severability is a matter of state law but claim that same has never been decided by the Michigan court in this instance. To the contrary, it appears rather clear that a majority of the Michigan Court regards section 6 as viable. In *In re Apportionment of Legislature,* 373 Mich 250, at 257, Justice Souris was the lone member of the Court to declare section 6 defunct, and acknowledged same in *In re Apportionment of Legislature,* 377 Mich 396 at 435, when he stated:

> "None of my colleagues agreed. Instead, having concluded, albeit *sub silentio,* that all of section 6 of article 4 survived our declaration of constitutional invalidity of the reapportionment formula of article 4 . . . ."

There was evidently no doubt in the mind of Justice Souris that all other members of the Court believed section 6 to be severable. Subsequent procedures recognized by this Court in its ultimate dismissal of *Marshall* v *Hare, supra,* denigrate any claim that section 6 is not severable from the sections of our Constitution which have fallen under *Reynolds* v *Sims, supra.*

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the United States District Court for the Eastern District of Michigan.

Respectfully submitted,

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